IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 876

EDDIE M. HARRISON,

Petitioner,

—v.—

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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I.

The Government Has Failed to Come to Grips With the Fundamental First Question Raised by This Appeal—Whether Testimony Compelled by Erroneous Admission of Illegally Obtained Confessions Can Be Used at a Subsequent Trial Despite the Fifth Amendment's Prohibition Against Compelled Testimony and the Principle That the Government May Not Use the Fruit of Its Own Wrongdoing to Secure Conviction.

The Government argues that the "petitioner's second-trial testimony was not 'compelled'" because it was the product of the Government's strong case, not the errone-

ous admission of the confessions. This is a mere play on words because the Government's "strong case" *was* the confessions and precious little else.

The Government concedes, as it must, that a defendant's testimony may not be used against him at a subsequent trial if that "testimony has been impelled by the knowledge that he will suffer a significant detriment" by not speaking, but argues that "Here there was no significant detriment which petitioner would suffer through a failure to become a witness at his second trial" because "Petitioner, by relying on his objections to the introduction of his inculpatory statements, could have adequately preserved his constitutional challenge to the propriety of that evidence and could thus have insured a retrial by prevailing, if his objections were well founded, on appeal." (Government Brief, pp. 13-14). Two factual problems with this argument are immediately apparent: (1) the petitioner could not have raised the objection that his confessions were obtained by threats (Government Brief, p. 23) without testifying and (2) the validity of the petitioner's other objections to admission of the confessions (ultimately sustained on appeal) was by no means certain at the time of the trial, a point which the Government subsequently argues at some length.[1] But the more basic objection to the Government's argument is that it ignores the main question, which is whether the introduction of the confessions put the petitioner under pressure to testify. That

[1] Government Brief, pp. 25, 32-34. It demands a great deal of court-appointed trial counsel to require him to be sure he is correct on a point of law that the Government denies, that the trial judge calls "close" (2 Tr. 499-504) and that the Court of Appeals took two years to decide because of its "complexity." The Government itself seems to suggest as much. (Government Brief, p. 26, n. 23).

it did seem too clear for cavil. If undisputed, the confessions spelled certain conviction in a capital case. The detriment of such a conviction seems plain enough to except the petitioner from "the fundamental principle that a defendant must be held accountable for his [*voluntary*] testimony." (Government Brief, p. 14). That the petitioner succumbed to this improper pressure does not serve either to excuse that pressure or to make him more "accountable" for the words so obtained than is the victim of any other improper pressure who might conceivably have resisted it but failed to do so.

However, the Government argues that the record shows the petitioner's testimony was not the "fruit" of its use of the illegally obtained confessions but of the petitioner's trial strategy, as evidenced by his counsel's remarks to the jury in his opening statement and in summation. These remarks, the Government argues, reveal that counsel did not intend at the outset of the trial to put the petitioner on the stand, despite foreknowledge of the existence of the confessions, but planned to destroy the Government's case by cross-examination, and that his failure to achieve the desired results on cross-examination caused him to reverse his position and put the petitioner on the stand.

Accepted at face value this argument seems to support the petitioner's view of the case rather than the Government's. Counsel's announced trial strategy was to keep the petitioner off the stand, and that decision was reversed, according to the Government's view, because cross-examination of the Government's witnesses revealed that the petitioner's testimony was needed to dispute the confessions.[2]

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[2] There is no reason to assume, as the Government argument seems to, that when counsel made his opening statement he knew his objections to admission of the confessions would be overruled.

In short, the Government seems to have demonstrated "something which is essentially beyond proof—that petitioner was placed in the position of having to choose between relying on his [overruled] objections and taking the witness stand to try to reduce the 'certainty' (see Pet. Br. 14) of an adverse verdict . . . . " (Government Brief, p. 15).

This compulsion, however, is excused by the Government because the prosecutor and the judge were acting in good faith, and the Government "cannot accept petitioner's implicit assumption that some kind of exclusionary rule should apply to a defendant's testimony given in response to evidence admitted through innocent prosecutorial or judicial error." (Government Brief, p. 24).[3] Such an argument might do if the only purpose of exclusionary rules were to police federal prosecutors and judges. But such policing is only one small aspect of the fundamental objective of exclusionary rules, which is to protect the rights of the accused and provide him a fair trial. Confronting the petitioner with inadmissible confessions was a basic violation of his rights that deprived him of a fair trial however innocent the error. And use of testimony obtained by this means was direct "exploitation of that illegality," in the words quoted by the Government from *Wong Sun* v. *United States*, 371 U.S. 471, 488 (1963).[4] It is simply not true, as the Government argues, that "the effects of that illegal-

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[3] *Cf.* Griswold, The Fifth Amendment Today, Harvard University Press, p. 7 (1955): "But torture was once used by honest and conscientious public servants . . . . "

[4] In view of the Government's argument on pages 19 and 20 concerning the distinction between "live witness testimony" and "inanimate evidence," it should be noted that the *Wong Sun* case dealt with "live" statements as well as seized narcotics. See, *e.g.*, 371 U.S. at 485-88.

ity were erased by the reversal of petitioner's conviction on appeal and the grant of a new trial from which the illegally obtained statements were excluded." (Government Brief, pp. 25-26). Rather, "the effects of that illegality" were used to render that new trial a nullity and obtain the petitioner's reconviction.

II.

The Government Has Failed to Show Adequate Excuse for the Failure to Provide the Petitioner the Speedy Trial Guaranteed Him by the Sixth Amendment.

The Government provides three answers to the petitioner's speedy trial argument: (1) that his ability to conduct his defense was not prejudiced; (2) that he was responsible for much of the delay at the trial level; and (3) that the time spent on appellate review was not unreasonably long. Each merits brief comment.

1. The Prejudice to the Petitioner

The Government argues that "one essential element is that the person claiming denial of the right to a speedy trial show that some material prejudice has resulted," citing this Court's opinion in *United States* v. *Ewell*, 383 U.S. 116, 122 (1966), and two cases from the D. C. Circuit. However, that circuit has made plain its view that the right of speedy trial

> "affords essentially a dual protection: against prejudice to a defendant's defense, and against prejudice to his person." *Hedgepeth* v. *United States*, 365 F.2d 952, 955 (D. C. Cir. 1966).

The dual nature of the right is also recognized by this Court's opinion in *United States* v. *Ewell, supra* at 120, where impairment of a petitioner's defense was listed as one purpose of that right, along with prevention of "undue and oppressive incarceration prior to trial" and minimizing the prisoner's "anxiety and concern." Nothing in the wording or the history of the Sixth Amendment supports the narrow interpretation the Government urges, nor does reason. The fact that a prisoner's defense might not be prejudiced by holding him indefinitely without a trial would not justify such a course, nor square it with the Sixth Amendment command of a speedy trial.

Another case cited by the Government, *Hedgepeth* v. *United States,* 364 F.2d 684 (D. C. Cir. 1966), states the rule quite the opposite of what the Government would have it. There the Court pointed out that "prejudice is considered to be presumed from, or necessarily inherent in, a long delay. *Petition of Provoo,* 17 F.R.D. 183, 203 (D. Md.), affirmed *per curiam,* 350 U.S. 857 . . . . " and stated further:

> "The possibility of prejudice from the delay is an important factor in close cases. But the very assumption of the Sixth Amendment is that unreasonable delays are by their nature prejudicial. It is not generally necessary for the defendant to demonstrate affirmatively how he has been prejudiced by an unreasonable delay." 364 F.2d at 687, n.3.

The petitioner believes that the delay in his case was unreasonably long and unnecessary and that the prejudice of six years' imprisonment before his last trial is alone sufficient to sustain his claim of denial of his right of speedy

trial. However, it is also apparent that he has sustained other prejudice. The fact that the Government witnesses had become unavailable prior to the third trial deprived the petitioner of his opportunity to cross-examine them, a point of considerable importance notwithstanding the fact that the opportunity had been afforded at a previous trial. And the mere fact that the Government's testimony was largely read from a prior transcript emphasized to the jury that this was a re-trial and perhaps suggested that the petitioner had been previously found guilty of the charge and was a criminal whose conviction had been reversed because of what the local newspapers frequently berate as technicalities and softness on the part of the appellate courts.[5]

2. Responsibility for Trial Delays

The Government attributes to the petitioner much of the delay between his first and second trials. In doing so it errs factually as to certain points to be discussed subsequently. But first the petitioner would challenge the underlying premise of the Government's argument, *i.e.*, that delay not occasioned by the Government can be disregarded. Again the *Hedgepeth* case, *supra*, speaks against the Government:

> "Although we agree with the Government that the delay up to March 15, 1965, is fairly attributable to the appellant and does not, in itself, constitute denial of a speedy trial, this does not mean that this period is to be disregarded. The passing of such a consider-

[5] As much was perhaps suggested by the prosecutor's closing argument. See 3 Tr. 137-38, 141, 177.

able length of time, no matter who is 'at fault,' should act as a spur to the Government to seek prompt trial. If the Government is lax in this regard, it is appropriate to take the earlier period into account in determining whether there has been a denial of the right to a speedy trial."[6]

Here the Government was not merely "lax" in seeking an expeditious trial, it actually opposed the granting of a new trial to the petitioner. (A. 6). And while the Government now sees "no evident reason why [t]he [petitioner] could not have filed the motion for a new trial and at the same time preserved his right to rely upon a defense of double jeopardy" (Government Brief, p. 31), the Government argued to the contrary at the time when the petitioner was sitting on death row confronted with the "Hobson's choice" the Government now asserts did not exist. (A. 7).

Moreover, the Government here seeks to attribute other delay to the petitioner that could not even arguably be his fault. The particulars are:

(a) The Government asserts that "The docket entries do not indicate the date of withdrawal of Mr. Halper, counsel for petitioner who had been appointed on July 31, 1961 . . . " and that "Therefore it is not clear from the record that petitioner, as he asserts (Pet. Br. 25), was without counsel for the entire four-month period between

[6] 364 F.2d at 688. See also the opinion of another panel of the same court in *Hedgepeth* v. *United States*, 365 F.2d 952, 954 (D.C. Cir. 1966), where the same judge wrote that "the fact that this delay is attributable to appellant does not mean that it is to be disregarded in considering whether a speedy trial was denied if there is an additional delay for which appellant is not responsible."

June and October 30, 1962, when new counsel was appointed to represent him." (Government Brief, p. 31, n.27). While the assertion as to the docket entries is true insofar as the record in this Court is concerned, lower court records indicate that on March 14, 1962, Mr. Halper moved to withdraw as counsel on the ground that he was physically unable to render efficient and adequate representation and this motion was granted on March 16, 1962. Moreover, the Court of Appeals Order of June 12, 1962, which is in the record in this Court, specifically recited that counsel for the petitioner had withdrawn.

(b). The Government asserts that "On January 18, 1963, petitioner's attorney (Mr. David) moved for a trial continuance of two months to March 18, 1963, which was granted." (Government Brief, p. 32). It is a fact that on January 17, 1963, the petitioner's appointed counsel sought a 30-day continuance because he had been unable to obtain a transcript of the first trial. Whether delay in furnishing needed transcript in a *forma pauperis* case is properly attributable to the prisoner is at least questionable. But even if it is, the delay *requested* was only one month out of the ten months involved between the time the Court of Appeals ordered a new trial and the time when that trial was actually held.

(c) The recitation in the Government's brief (p. 32) leaves the impression that argument of the petitioner's motion to dismiss on March 29, 1963, caused further postponement of the trial to April 22, 1963. That is not so. Before that argument the trial was set for April 8, 1963.[7]

[7] The postponement from March 18, 1963, to April 8, 1963, came on February 27, 1963. On that day the Chief Judge sent a letter to the clerk advising that he was relieving Harrison's appointed

The delay to April 22, as the Government has previously admitted, was occasioned by the imminence of the court's Easter recess.[8] The case was set for April 8, Easter was April 14, and the continuance was from April 8 to April 22, 1963.

In light of the foregoing it is not factually correct to say, as the Government does, that "The court of appeals' conclusion that on this record this period of delay ["from June 1962, when the court of appeals ordered a new trial, to April 1963, when the trial commenced" (Government Brief, p. 31)] could fairly be attributed to petitioner was correct." (Government Brief, p. 32).

3. Time Taken for Appellate Review

The petitioner has already expressed his view that his case did not require the time it actually took in the Court of Appeals, and will not repeat here what is said in his original brief. One point, however, should be clarified. The Government says:

> "We do not construe petitioner as protesting the reasonableness of the eight and one-half month period needed for the orderly and deliberate consideration by

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counsel (Mr. Woods) due to the press of private business and continuing the trial three weeks, from March 18 to April 8. This delay wasn't the prosecutor's fault, but neither was it the petitioner's since it stemmed solely from the court's relieving an appointed counsel due to the press of his private business.

[8] See "Supplement to Appellee's Brief" filed December 16, 1963, p. 4, where the Government recited: "April 5, 1963: Trial date continued from April 8 to April 22, 1963. The transcript of this proceeding (supplemental record on appeal) suggests that the case was continued because of the imminence of the Easter recess."

the court of appeals (including the disposal of a petition for rehearing *en banc*) of the issues raised after his instant conviction (see Pet. Br. 26)." (Government Brief, p. 34, n.31).

Counsel apologizes for misleading the Government on this score. Actually the petitioner's speedy trial point is twofold: (1) that the case should have been dismissed prior to his third trial for violation of his right to a speedy trial and (2) that the indictment should now be dismissed if the petitioner prevails on his first point in this Court because the time has long since passed when he could be afforded the speedy trial to which he was entitled. To this second point the delay involved in the petitioner's most recent appeal is pertinent as is every day now passing while he sits in jail without having had a fair trial some eight years after indictment.

Respectfully submitted,

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